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**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
76N 30010429 BY THOMPSON RIVER)
LUMBER COMPANY)**

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on October 13, 2005, in Missoula, Montana, to determine whether a beneficial water use permit should be issued to Thompson River Lumber Company of Montana, Inc., hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel, John E. Bloomquist. Roger Claridge, President of Thompson River Lumber Company (TRLIC) and Applicant; Fred Busch, Senior Management Officer with Savage Services; and Karl Uhlig, Water Rights Specialist, Land and Water Consulting, a division of PBS&J, testified for the Applicant.

Objector Avista Corporation (Avista) appeared at the hearing by and through counsel, R. Blair Strong. Steven Silkworth, P.E. and Manager of Wholesale Power, Avista Corp. testified for this Objector.

No other Objectors appeared.

Kurt Hafferman, Manager, Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Applicant.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered nine exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit 1, 2, 4-9. Applicant's Exhibit A3 was withdrawn.

1 **Applicant's Exhibit A1** is a one-page copy of Centrifugal Pump Characteristics, Goulds
2 Pumps, Inc.

3 **Applicant's Exhibit A2** consists of three pages of Clark Fork River gauging data from
4 the USGS Gauge 12391400 below Noxon Rapids Dam. One page is a tabulation, and two
5 pages are charts prepared by Applicant's consultant.

6 **Applicant's Exhibit A4** consists of a large map showing project features prepared by
7 Land and Water Consulting, a Division of PBS&J and dated June 2005.

8 **Applicant's Exhibit A5** consists of three sets of TRLC drawings: (1) Thompson River
9 Go-Gen Facility Site Plan drawing prepared by Land & Water Consulting, revised June 7, 2005,
10 (2) Thompson River Go-Gen Facility Site Plan drawing prepared by Land & Water Consulting,
11 revised July 7, 2005, and an eight-page set of construction drawings for a temporary storage
12 pond dated July 2004, prepared by Morrison Maierle, Inc.

13 **Applicant's Exhibit A6** consists of one 11" by 17" chart entitled *Estimated Thompson*
14 *River Co – Gen Well Water Balance*.

15 **Applicant's Exhibit A7** is a facsimile of Applicant's Permit To Appropriate Water Right
16 No. 76N 30011235.

17 **Applicant's Exhibit A8** consists of a one-page copy of a 2005 tax assessment notice
18 from Sanders County.

19 **Applicant's Exhibit A9** is a five-page copy of relevant portions of a lease agreement
20 between Thompson River Lumber Company, Inc. and Thompson River Co-Gen LLC.

21 **Applicant's Exhibit A10** consists of eleven pages of Karl Uhlig's pre-filed testimony.
22 Objector offered eleven exhibits for the record. The Hearing Examiner accepted and
23 admitted into evidence Objector's Exhibit Nos. O Silkworth 1-11.

24 **Objector's Exhibit O Silkworth 1** is a three-page copy of Steven Silkworth's
25 Qualifications and Professional Experience.

26 **Objector's Exhibit O Silkworth 2** is a 30 x 60 minute series Geological Survey
27 topographic map entitled: Thompson Falls, Montana – Idaho.

28 **Objector's Exhibit O Silkworth 3** is a ten-page copy of Findings of Fact, Conclusions of
29 Law, and Order, Case 76N-46, Montana Water Court, Clark Fork Division.

30 **Objector's Exhibit O Silkworth 4** consists of a certification page and a copy of Permit
31 to Appropriate Water, and Notice of Completion of Water Development for Water Right Number
32 P004189-76N.

Objector's Exhibit O Silkworth 5 is a one-page graph entitled: "Noxon Rapids Dam – Average Inflow by Month, 1985 – 2004 Daily Data," compiled by Mr. Silkworth.

Objector's Exhibit O Silkworth 6 is a one-page graph entitled: “Noxon Rapids Inflow – 1985 –2004 Daily Values, Average Number of Days per Month Exceeding 50,000 cfs,” compiled by Mr. Silkworth.

Objector's Exhibit O Silkworth 7 is a three-page memorandum from Steve Silkworth entitled: "Energy Lost Due to Upstream Surface Water Diversion" which refers to Exhibit Nos. O Silkworth 6, 8, 9.

Objector's Exhibit O Silkworth 8 is a one-page graph entitled: "Cabinet Gorge Inflow – 1985 – 2004 Daily Values, Average Number of Days per Month Exceeding 38,000 cfs." prepared by Mr. Silkworth.

Objector's Exhibit O Silkworth 9 is a one-page chart entitled: "Avista Utilities 2003 Electric Integrated Resources Plan." prepared by Mr. Silkworth.

Objector's Exhibit O Silkworth 10 consists of fourteen pages of pre-filed direct testimony of Steven G. Silkworth.

Objector's Exhibit O Silkworth 11 is a one-page update of portions of page 9 of Steve Silkworth's pre-filed testimony. (Exhibit O Silkworth 10)

PRELIMINARY MATTERS

Prior to the hearing, Applicant's Motion For Discovery Sanctions was Granted and Objectors Jon Cheetham, Lynn and Valerie Lanzoni, and Roberta Demmer were sanctioned such that they were not allowed to present witnesses at hearing, and the Applicant's requests for admissions were deemed admitted. During the Hearing Applicant moved for an order finding these Objectors in default and for the dismissal of their objections, including the water quality objection of Objectors Cheetham and Demmer. These Objectors did not appear at the hearing. The motion was GRANTED on record of the hearing. The Objections were dismissed with prejudice and the Applicant was notified that they did not have to meet the water quality criterion because there was no longer a valid water quality objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

1

2 **FINDINGS OF FACT**

3 **General**

4 1. Application for Beneficial Water Use Permit 76N 30010429 in the name of Thompson
5 River Lumber Company of Montana, Inc. and signed by Barbara Wolstein, Secretary, was filed
6 with the Department on April 29, 2004. (Department file)

7 2. Notice of the Application was properly made in the *Sanders County Ledger* on
8 September 9, 2004. (Department file)

9 3. The Environmental Assessment (EA) dated June 8, 2004, prepared by the Department
10 for these applications was reviewed and is included in the record of this proceeding.

11 4. Applicant seeks to appropriate 250 gallons per minute (gpm) up to 400 acre-feet of water
12 per year from the Clark Fork River. The water is to be diverted at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$
13 of Section 13, Township 21 North, Range 29 West, Sanders County, Montana. The proposed
14 means of diversion is a pump. The proposed use is power generation. The proposed place of
15 use is in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 13, Township 21 North,
16 Range 29 West, Sanders County, Montana. The proposed period of diversion and period of use
17 is January 1 through December 31, inclusive. The proposed 3.5-acre evaporation pond place of
18 storage for water treated after use in the generation of power, with a volume of 34.00 acre-feet
19 is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 21 North, Range 29 West, Sanders
20 County, Montana. (Department file)

21 5. Objector Avista Corporation is the owner of downstream Clark Fork River Water Right
22 Nos. 76N P004189-00 for 15,000 cubic feet per second (cfs) and 76N W-125799-00 for 40,400
23 cfs. (Department file)

24 **Physical Availability**

25 6. Applicant reviewed U.S. Geological Survey Streamflow Statistics for the gauging sites
26 located on the Clark Fork River upstream of the project site near Plains, Montana (period of
27 record: 1910 to present), and downstream of the project site about 5 miles (period of record: 8
28 years in the 1950's). The Hearing Examiner did not find the distance between Plains, Montana,
29 and the project site in the record; however, the Hearing Examiner takes judicial notice that
30 Plains is upstream of the City of Thompson Falls approximately 25-30 miles. The average
31 monthly Clark Fork River flows at the Thompson Falls gauge varied from a low of 9,680 cubic

1 feet per second (cfs) (typically occurring in September) to a June high of 57,600 cfs. The data
2 from the gauge near Plains, Montana, shows the September low is approximately 9,800 cfs and
3 the June average is 45,600 cfs. Applicant is requesting 0.56 cfs which is less than the gauged
4 low flows both upstream and downstream of the proposed point of diversion. Water is physically
5 available. (Department file, testimony of Karl Uhlig)

6 **Legal Availability**

7 7. Applicant reviewed existing gauging data described in Finding of Fact No.6 above, and
8 compared that data to the DNRC water right records for the Clark Fork River for a distance of
9 five miles downstream of the proposed point of diversion. The largest water right in this river
10 reach is Pacific Power & Light's (hereafter PPL) for 23,420 cfs for power generation at its
11 Thompson Falls facility. Applicant's project site is approximately five miles upstream of
12 Thompson Falls and PPL's facility. Applicant's consultant testified that the requested 0.56 cfs is
13 so small (0.0062% of physical flow in the river) that PPL would not be able to accurately
14 measure the difference through its turbines if Applicant was pumping or not. In addition,
15 Applicant reviewed DNRC water right records for rights that are junior to the PPL water right.
16 Applicant found that 891 new water rights were issued by DNRC in river drainages above the
17 PPL generation facility since May 1992 (the date of PPL's 23,420 cfs water right) for a combined
18 total of 1,467.7 cfs up to 72,771 acre-feet. Applicant then reviewed gauging data and DNRC
19 water right records for the source down to Objector Avista's water right (50,000 cfs) at Noxon
20 Rapids Dam. Applicant found there are periods of time between April and July in most years,
21 and other periods in some years, when flows exceed 50,000 cfs. Applicant points out that
22 Objector Avista's water right was perfected before recent late season releases from up-gradient
23 Hungry Horse Dam. Applicant argues that these late season releases were not available to PPL
24 and Objector Avista when they completed their projects, and the water released from the up-
25 gradient dams is available for appropriation by Applicant. Applicant presented no other
26 supporting evidence regarding these late season flows, and Applicant presented no data
27 regarding the amount or timing of these "late season flows." Applicant argues that water is
28 available for appropriation at any time the flow in the Clark Fork River is more than 50,000 cfs or
29 at any time Objector Avista's needs are less than 50,000 cfs. (Department file, testimony of Karl
30 Uhlig)

31 8. Objector Avista has existing Montana water rights totaling 50,000 cfs, which are located
32 approximately 40 miles downstream from Applicant's project on the Clark Fork River. The Clark

1 Fork River water flows past the Applicant's proposed point of diversion, downstream through
2 PPL's power generating facility at Thompson Falls and then re-enters the Clark Fork River and
3 flows in the river channel until it enters the reservoir of Avista's Noxon Rapids Dam. Objector
4 Avista uses the flows of the Clark Fork River up to 50,000 cfs at the Noxon Rapids Dam to
5 generate electricity and/or refill the reservoir behind the Noxon Rapids Dam to maintain
6 elevation head. Objector Avista maintains records of flow through its turbine generators on a
7 daily basis. There is no month during which flows, on average, exceed 50,000 cfs (Exhibit O
8 Silkworth 5). From the same daily flow records Objector Avista compiled the number of days, on
9 average a year, when flows of the Clark Fork River at the Noxon Rapids Dam exceed 50,000
10 cfs. The daily flow information between 1985 and 2004, shows that the average number of days
11 per month exceeding 50,000 cfs equaled 0.8 days in April, 5.4 days in May, 9.1 days in June,
12 and 0.7 days in July for a total of 16.1 days per year when flows exceed 50,000 cfs at Noxon
13 Rapids Dam. Applicant determined the average number of days in a year when flow at Noxon
14 Rapids Dam exceeds 50,000 cfs is 23.7 days. The difference between 16.1 and 23.7 days is the
15 result of the different periods of record used by the Parties; Applicant used 1960 to 2004, and
16 Objector used 1985 to 2004. (Department file, testimony of Kurt Hafferman, Steve Silkworth,
17 Karl Uhlig)

18 **Adverse Effect**

19 9. Adverse affect must be determined based on a consideration of an applicant's plan for
20 the exercise of the permit that demonstrates that the applicant's use of water will be controlled
21 so the water rights of a prior appropriator will be satisfied. Applicant plans to use Water Use
22 Permit No. 76N 30011235, issued for a ground water source, to provide water when Clark Fork
23 River water use would adversely affect a downstream senior appropriator. However, Applicant
24 states that if it knows Objector Avista's "ramping" flows, it could go to a website to check river
25 flows to know when water flows exceed the flows needed for Avista's power generation.

26 (Department file, testimony of Karl Uhlig)

27 10. Applicant and others testified that 250 gpm is not measurable at downstream diversions
28 when compared to the total flow in the Clark Fork River. Applicant claims it is futile to measure
29 250 gpm (.56 cfs) flowing in the River. Applicant is willing to decrease diversions if a call on the
30 source is made by a downstream senior appropriator. Applicant states they will be responsive to
31 a daily call by Objector Avista if Avista can put 250 gpm to use and can see results of the call.
32 The evidence presented by Applicant regarding whether 250 gpm will show up at Objector

1 Avista's point of diversion came from Karl Uhlig who agreed that if one assumes all else is
2 equal, then an additional 250 gpm put in the River at the Thompson Falls dam would increase
3 flows by 250 gpm in the reservoir above the Noxon Rapids Dam. However, the 250 gpm
4 increase may not be detectable. Water in the reservoir is used for power generation.

5 (Department file, testimony of Karl Uhlig, Kurt Hafferman, Steve Silkworth)

6 11. Objector Avista uses all river flows up to 50,000 cfs for power generation, refilling
7 storage behind Noxon Rapids Dam, and for evaporation from the stored water surface. The only
8 water not used for power generation is evaporation from the reservoir surface, or that is spilled
9 when flows exceed 50,000 cfs. Objector Avista has water rights for power generation, for
10 reservoir storage and release for power generation and reregulation of the flows in the Clark
11 Fork River, and to provide hydraulic head for power generation at its facility at Noxon Rapids
12 Dam in the amount of 50,000 cfs. The impact of 250 gpm of flow on Objector Avista is small,
13 and Objector Avista can still exercise its water right even if this permit is issued - they can't
14 exercise their full right. However, Objector Avista will generate less power when river flows are
15 reduced by the requested 250 gpm – they are either using the water to generate power or to
16 refill their storage. Objector Avista's power generation facility operation varies throughout each
17 day depending on the power load and prices. Water is spilled without use by Objector Avista at
18 its Noxon Rapids generating facility only 16 to 24 days on average each year. Objector Avista
19 will be not be able to fully exercise its water rights when Clark Fork River flows are less than
20 50,000 cfs. (Department file, testimony of Steve Silkworth, Objector Silkworth Exhibit Nos. 3, 4)

21 **Adequacy of Appropriation Works**

22 12. Applicant's means of diversion is two twenty-five (25) horsepower pumps, delivery
23 pipeline, and appropriate valving that was designed by a professional engineering firm to
24 provide the necessary water for this purpose. The appropriation works are adequate to divert
25 the requested flow and operate to provide water to the proposed use. (Department file,
26 testimony of Karl Uhlig)

27 **Beneficial Use**

28 13. The proposed power generation in a steam generating plant and ancillary systems is a
29 beneficial use of water. Applicant determined flow rate and volume based upon system design
30 and anticipated electrical demands. Applicant has provided evidence of a direct correlation
31 between the amount of water applied for and the need for that amount of water to generate
32 power. The power generation purpose is beneficial and the amounts are the minimum

1 necessary amounts to sustain the purpose. (Department file, testimony of Fred Busch, Karl
2 Uhlig)

3 **Possessory Interest**

4 14. Applicant is the owner of the property which has been designated in the Application as
5 the place of use. (Department file, testimony of Roger Claridge)

6 **Water Quality Issues**

7 15. Seven objections relative to water quality were filed against this application. Five of
8 these Objectors withdrew their objections prior to the hearing. The remaining two valid water
9 quality objections were dismissed at hearing after being found in default and dismissed with
10 prejudice. Therefore, there are no valid water quality objections to this application. There were
11 no objections relative to water classification or to the ability of a discharge permit holder to
12 satisfy effluent limitations of his permit. (Department file)

13 Based on the foregoing Findings of Fact and the record in this matter, the Hearing
14 Examiner makes the following:
15

16 **CONCLUSIONS OF LAW**

17 1. The Department has jurisdiction to issue a provisional permit for the beneficial use of
18 water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of
19 the evidence. Mont. Code Ann. § 85-2-311(1).

20 2. A permit shall be issued if there is water physically available at the proposed point of
21 diversion in the amount that the applicant seeks to appropriate; water can reasonably be
22 considered legally available during the period in which the applicant seeks to appropriate, and in
23 the amount requested, based on an **analysis** of the evidence on physical water availability and
24 the existing legal demands, including but not limited to a comparison of the physical water
25 supply at the proposed point of diversion with the existing legal demands on the supply of water;
26 the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a
27 state reservation will not be adversely affected based on a consideration of an applicant's **plan**
28 for the exercise of the permit that demonstrates that the applicant's use of the water will be
29 controlled so the water right of a prior appropriator will be satisfied; the proposed means of
30 diversion, construction, and operation of the appropriation works are adequate; the proposed
31 use of water is a beneficial use; the applicant has a possessory interest, or the written consent

1 of the person with the possessory interest, in the property where the water is to be put to
2 beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not
3 be adversely affected, the proposed use will be substantially in accordance with the
4 classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of
5 a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

6 3. The Hearing Examiner may take notice of judicially cognizable or generally recognized
7 technical or scientific facts within the Department's specialized knowledge. Parties shall be
8 notified either before or during the hearing or by reference in the proposal for decision of the
9 material noticed. Parties may contest the materials first noticed in this proposal for decision by
10 filing exceptions to the proposal for decision. Mont. Admin. R. 36.12.221(4); Mont. Admin. R.
11 36.12.229. See Finding of Fact No. 6.

12 4. The Applicant has proven that water is physically available at the proposed point of
13 diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont.
14 Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact No. 6.

15 5. The Applicant has not proven that water can reasonably be considered legally available.
16 Applicant has proven that water is only available at times the flows at Noxon Rapids Dam
17 exceed 50,000 cfs. Legal availability is determined by analysis of non-drought periods. See In
18 The Matter of Application 41B-074154 by Johnson, Proposal for Decision, (1990). Applicant has
19 shown in non-drought years sufficient unappropriated water will be physically available at the
20 point of diversion to supply the amount requested only for 16 to 24 days throughout the period
21 of appropriation (January 1 through December 31). An applicant must prove that, at least in
22 some years, sufficient unappropriated water will be physically available at the point of diversion
23 to supply the amount requested throughout the period of appropriation, and that at least in
24 some years, no legitimate calls for water will be made on him by a senior appropriator. In the
25 Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (1992).
26 However, Applicant has not shown that legitimate calls for water will not be made on him by a
27 senior appropriator in at least some years. Here, Applicant could expect calls for water for all but
28 16 to 24 days of each year. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 7, 8.

29 6. The Applicant has not proven that the water rights of prior appropriators under existing
30 water rights, certificates, permits, or state reservations will not be adversely affected when
31 conditioned according to the plan to have downstream senior appropriators call the source when
32 their rights are not being met. In the situation at hand, the evidence is that Objector Avista will

1 not likely be able to look at their measuring gauge and know that river flows have been reduced
2 by 250 gpm (i.e. that Applicant's pump is running). That does not mean Objector Avista is not
3 adversely affected. At flows less than 50,000 cfs, Objector Avista would be short 250 gpm at
4 times Applicant's pump is running. Objector Avista would have to call the Applicant to find out if
5 Applicant's pumps are running. Applicant's plan would have Avista call Applicant to see if they
6 are pumping, then decide if they must call the source rather than have the Applicant call to
7 make sure water is available for use prior to turning on the pump. The burden in Applicant's plan
8 is on the wrong appropriator. Avista would be short 250 gpm in all but 16-24 days per year when
9 their reservoir is full and the project is spilling water.

10 A discussion of the use of the word "futile" as used in hearing testimony is needed here.
11 Testimony in this case concerned the phrase "futile to measure" which is different from the
12 phrase "futile call" when used in water right context. A call is not futile because the water not
13 reaching Objector Avista is too small to measure at Objector's point of diversion. Case law in
14 this context does not discuss the measurability of water reaching the downstream senior.
15 Instead, case law discusses whether the water will reach the downstream senior.

16 In order to justify their diversion, defendants must be in a position to show affirmatively
17 that **under all the conditions such diversion does not reduce or limit the plaintiffs'**
18 **receipt of water to which the latter are entitled.** Possibly defendants can prove that
19 plaintiffs have received their full appropriation in spite of defendants' taking of water. Or it
20 may be that in a particular instance defendants can show that the rainfall was sufficiently
21 slight and the stream bed sufficiently dry that no water would reach plaintiffs whether or
22 not the defendants impounded or diverted water at their dam; and in that event
23 defendants' acts would not be detrimental to plaintiffs. That is the limit of the meaning
24 attributable to the court's statement on this question in *Raymond v. Wimsette*, 12 Mont.
25 551, 31 P. 537, 33 Am.St.Rep. 604.

26
27 *Irion v. Hyde*, 105 P.2d 666, *674, (Mont. 1940) (emphasis added). There was no evidence in
28 this case that the 250 gpm that the Applicant seeks to appropriate would not reach the Noxon
29 Rapids Dam.

30 The Objector here will not receive all water to which they are entitled at times the flows
31 in the Clark Fork River do not exceed 50,000 cfs. Mont. Code Ann. § 85-2-311(1)(b). Flows
32 exceed 50,000 cfs only 16-24 days per year. The record here shows that Objector Avista will be
33 adversely affected by diminished flows in the amount of the Applicant's proposed diversion on
34 the days where flows do not exceed 50,000 cfs. The Applicant failed to prove by a

preponderance of the evidence that prior appropriators will not be adversely affected by the proposed appropriation. See Finding of Fact Nos. 9, 10, 11.

7. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact No. 12.

8. The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact No. 13.

9. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See Finding of Fact No. 14.

10. Valid water quality objections were raised as to the issue of water quality of a prior appropriator being adversely affected. However, these Objections were withdrawn or dismissed at hearing. No valid water quality objections were filed alleging that the proposed use is not in accordance with a classification of water, nor as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. This Hearing Examiner interprets a “dismissed” objection the same as a “withdrawn” objection. See Mont. Admin. R. 36.12.208. That is, it is as if it were never filed. Here, all valid objections were withdrawn or dismissed, so Applicant need only prove the criteria in Mont. Code Ann. §§ 85-2-311(1)(a-e). Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See Preliminary Matters on page 3, and Finding of Fact No. 15.

11. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Applicant has not met the criteria for issuance of a permit. Mont. Code Ann. § 85-2-312. See Conclusions of Law Nos. 5, 6.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company is **DENIED**.

1 **NOTICE**

2 This Proposal for Decision may be adopted as the Department's final decision unless
3 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
4 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
5 argument. Exceptions and briefs, and requests for oral argument must be filed with the
6 Department by April 19, 2006, or postmarked by the same date, and copies mailed by that same
7 date to all parties.

8 Parties may file responses and response briefs to any exception filed by another party.
9 The responses and response briefs must be filed with the Department by May 1, 2006, or
10 postmarked by the same date, and copies must be mailed by that same date to all parties. No
11 new evidence will be considered.

12 No final decision shall be made until after the expiration of the above time periods, and
13 due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

14 Dated this 30th day of March 2006.
15

16 / Original Signed By Charles F Brasen /

17 Charles F Brasen
18 Hearing Examiner
19 Water Resources Division
20 Department of Natural Resources
21 and Conservation
22 PO Box 201601
23 Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 30th day of March 2006 by first class United States mail.

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/ Original Signed By Jamie Scow /

JAMIE SCOW
HEARING UNIT
406.444.6615

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO. 76N-
30010429 BY THOMPSON RIVER LUMBER
COMPANY**

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FINAL ORDER

BACKGROUND

The Proposal for Decision (PFD) in this matter was entered on March 30, 2006. Applicant Thompson River Lumber (TRL) filed timely exceptions and brief to the PFD on April 18, 2006. TRL requested an oral argument hearing. Objector Avista Corporation (Avista) filed a response in opposition to the exceptions filed by TRL on May 1, 2006. Oral argument on the exceptions was held on August 8, 2006. Presenting argument at the oral argument were John Bloomquist for applicant TRL and R. Blair Strong for objector Avista.

The PFD recommended denial of Application No. 76N-30010429 because the Hearing Examiner found that the applicant did not prove that water can reasonably be considered legally available and that applicant did not prove that the water rights of prior appropriators under existing water rights, certificates, permits or state reservations will not be adversely affected.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order: reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. *Strom v. Logan*, 304 Mont. 176, 18 P.3d 1024 (2001). Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. ARM 36.12.229(2). The record was closed at

the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

I have considered the exceptions and reviewed the record under these standards.

DISCUSSION

Applicant's Exceptions

Applicant argues that the Hearing Examiner's Proposal for Decision was in error because:

- 1) Objector, Avista, does not have "existing" Montana water rights totaling 50,000 c.f.s.
- 2) Objector, Avista, does not use all the flows of the Clark Fork River up to 50,000 c.f.s. at Noxon Rapids Dam to "generate electricity and/or refill the reservoir" behind Noxon Rapids Dam.
- 3) the evidence regarding whether 250 gpm would be available at Noxon Rapids Dam at Avista's point of diversion was miscomprehended.
- 4) the record demonstrates Avista does not use all river flow up to 50,000 c.f.s., for power generation, refilling, storage, or evaporation purposes.
- 5) Conclusion of Law No. 5 misstates the record evidence, miscomprehends the evidence, and applies a test for legal availability not in effect under the Montana Water Use Act.
- 6) Conclusion of Law No. 6 misstates the record evidence, miscomprehends the evidence, and misapplies the test for adverse effect under Montana law.
- 7) the proposed order denying the permit application is not supported by the record evidence, misapplies or miscomprehends the evidence, and erroneously applies Montana law and the Water Use Act.

Objectors Response

Avista responds that the PFD, whether modified or not as to minor points, is fully supported by the record and the law in proposing to deny TRL's application.

Exception 1. Legal Availability – Finding of Fact No. 8

TRL argues that the Hearing Examiner erred in finding that Avista has "existing" water rights in the amount of 50,000 c.f.s. TRL argues that Avista has existing water right claims for 40,400 c.f.s. based on their pre-1973 claim filing. TRL relies on the definition of "existing right" or "existing water right" as defined in Mont. Code Ann. § 85-2-102(10). However, the criteria for issuance of a permit under Mont. Code Ann. § 85-2-311(a)(ii)(B) provides that the analysis for determining legal availability includes "identification of existing legal demands on the source of

supply.” “Legal demands” clearly include Beneficial Water Use Permits issued by the Department. To argue otherwise is to conclude that the permits issued by the Department do not represent a valid, legal water right, which is certainly not the case. Mont. Code Ann. § 85-2-301 (a person may not appropriate water except as provided in this chapter). The Hearing Examiner in this matter properly considered both Avista’s pre-1973 claims and Avista’s July 3, 1976 Permit to Appropriate Water which specifically states:

The waters appropriated shall be diverted at a rate of not to exceed 15,000 cubic feet per second, making a total appropriation on the Clark Fork River of 50,000 cubic feet per second.

The PFD correctly reflects that the legal demand placed on the river by Avista’s existing water appropriations is at least 50,000 c.f.s. Finding of Fact No. 8 will not be modified or rejected based upon this exception.

Exception 2. Legal Availability – Finding of Fact No. 8

TRL next argues that Avista does not use all of the flows of the Clark Fork River up to 50,000 c.f.s. at Noxon Rapids Dam to “generate electricity and/or refill the reservoir” behind Noxon Rapids Dam, as the Hearing Examiner found.

The Hearing Examiner found, and the record supports, that “Avista uses the flows of the Clark Fork River up to 50,000 cfs at the Noxon Rapids Dam to generate electricity *and/or refill the reservoir* behind the Noxon rapids Dam to maintain elevation head” (emphasis supplied). This implies that the operation of Noxon Rapids Dam is not solely a “run of the river” dam, but includes a component of storage and storage use to generate electricity. TRL’s assertion that “Avista does not continuously utilize all flow in the Clark Fork River up to 50,000 cfs to generate electricity, and Noxon Rapids Dam has limited storage capacity” falls short in that Avista has the right to replenish any used storage through their water right(s).

The PFD and the evidence relied upon by the Hearing Examiner supports Finding of Fact No. 8 and it will not be modified or rejected based upon this exception.

Exception 3. Adverse Effect – Finding of Fact No. 10

TRL asserts that the Hearing Examiner miscomprehended the evidence regarding whether 250 gpm would be available at Noxon Rapids Dam at Avista’s point of diversion. The argument appears to be that TRL’s use of 250 gpm is not measurable or detectable at Avista’s point of diversion.

The evidence in the record is uncontroverted that a reduction of 250 gpm above Avista’s

point of diversion is a loss of 250 gpm to Avista's water right of 50,000 cfs at times when the flow of the Clark Fork River is below 50,000 cfs. The evidence also supports a conclusion that cumulatively, a loss of 250 gpm (400 acre-feet per year) could be detected by Avista. The burden is on the applicant to prove no adverse effect. Applicant did not prove that the effect of the proposed use on Avista's use/generation of electricity could not be measured.

The PFD and the evidence relied upon by the Hearing Examiner supports Finding of Fact No. 10 and it will not be modified or rejected based upon this exception.

Exception 4. Adverse Effect – Finding of Fact No. 11

TRL argues that Finding of Fact No. 11 is in error because the Hearing Examiner found that Avista uses all river flow up to 50,000 cfs for power generation, refilling, storage, or evaporation purposes; that the only water not used for power generation is "evaporation" from the reservoir, or that is spilled when flows exceed 50,000 cfs; that Avista has water rights in the amount of 50,000 cfs for power generation, reservoir storage, and release for power generation and re-regulation of flow in the Clark Fork River; that Avista cannot exercise their "full right"; that water is spilled without use by Avista at its Noxon Rapids generating facility only 16-24 days on average each year; and that Avista will not be able to fully exercise its water rights when flows are less than 50,000 cfs.

The Hearing Examiner correctly found from the testimony that each of the above statements is based upon competent substantial evidence. Finding of Fact No. 11 in the PFD will not be modified or rejected based upon this exception.

Exception 5. Legal Availability – Conclusion of Law No. 5

TRL asserts that the entire Conclusion of Law No. 5 misstates the record evidence, miscomprehends the evidence, and applies a test for legal availability no in effect under the Montana Water Use Act. TRL focuses once again on Avista's court decreed water right and attempts to argue that under that right alone there would be water legally available for TRL. However, as discussed above, Avista's rights to the Clark Fork River include both the court decreed water right and their permit from the DNRC. In addition, TRL focuses only on the power generation aspect of Avista's rights and ignores the storage and other components necessarily included in order for Avista to operate their power generation facilities. I find this argument without merit. TRL next argues that the Hearing Examiner applied an outdated, inapplicable standard to "legal availability." The Hearing Examiner, in Conclusion No. 5, states that the TRL has proven that water is only available at times the flows at Noxon Rapids Dam

exceed 50,000 cfs which is only on average 16-24 days per year and that TRL has not shown that at least in some years that calls for water would be made on them. These two measures of “legal availability” stem from decisions of the DNRC made prior to the current language of § 85-2-311. (In the Matter of Application 41B-074154 by Johnson, PFD (1990) and In the Matter of Application No. 81705-g76F by Hanson, PFD (1992). The current language of § 85-2-311(1)(a)(ii) states that the applicant must prove that “water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested . . .” It is apparent that the Hearing Examiner, using previous interpretations of “legally available,” determined that TRL’s use of water for only 16-24 days per year without a call being made upon them, when they have applied for a permit to appropriate for 365 days per year (approximately 7% of the period of use for the requested appropriation), is not reasonably available during the period in which TRL has requested.

The Hearing Examiner’s use of the *Johnson* and *Hanson* methodology is not clearly erroneous and comports with the current statutory language requiring an “analysis of the evidence on physical water availability and the existing legal demands.” Conclusion of Law No. 5 will not be modified or rejected based upon this exception.

Exception No. 6 – Adverse Effect – Conclusion of Law No. 6

TRL asserts that the entire conclusion of law misstates the record evidence, miscomprehends the evidence, and misapplies the test for adverse effect under Montana Law. TRL first argues that Conclusion of Law No. 6 must be reversed based upon the underlying Finding of Fact No.’s 10 and 11 being in error. As previously discussed, I have rejected those arguments. TRL next argues that objector Avista is not entitled to “maintenance of stream conditions provided Avista may reasonably exercise its power generation and storage rights under any changed conditions.” In support of this statement TRL cites M.C.A. § 85-2-401(1). However, § 85-2-401(1) relates to changes in appropriations, not to the granting of a new appropriation or permit as evidenced by the language of that section stating “As between appropriators . . .” The Hearing Examiner plainly believed that, based upon the evidence before him, that the applicant did not prove by a preponderance of the evidence that there would be no adverse affect by the proposed appropriation. In addition, TRL argues that the Hearing Examiner did not properly consider TRL’s proposed use of ground water as an alternative source of water to ameliorate any adverse impacts caused by the proposed appropriation. The Hearing Examiner again found, based upon the evidence, that even with TRL’s plan to switch to their ground water source during certain times when downstream water users were being

adversely affected or when Avista made a call on the river, failed to prove by a preponderance of the evidence that no adverse effect would occur. I find nothing in the record to compel me to modify or reject the Hearing Examiner's Conclusion of Law No. 6.

Exception No. 7 – Proposed Order

TRL asserts that the proposed order denying the permit application is not supported by the record evidence, misapplies or misconprehends the evidence, and erroneously applies Montana law the and Water Use Act. TRL requests that the proposed order be set aside, and the permit application granted as supported by the record. TRL does not specifically argue this exception in their filing of exceptions. DNRC rule A.R.M. 36.12.229 provides that “[e]xceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies . . .” TRL has made the argument(s) upon which this exception is taken in the context of the previous six exceptions addressed in this order. As discussed under the six exceptions above, this exception is without merit.

Based on the record in this matter, the Department makes the following:

ORDER

The Department hereby adopts and incorporates by reference, without modifications, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Application for Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company is **DENIED**.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceedings elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 21st day of December, 2006.

/Original Signed by David A. Vogler/
David A. Vogler
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL DECISION IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76N-30010429 BY THOMPSON RIVER LUMBER CO. was served upon all parties listed below on this 21st day of December, 2006, by first class United States mail.

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